

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

Oneida Nation,

Plaintiff,

v.

Case No. 16-CV-1217

Village of Hobart, Wisconsin,

Defendant.

VILLAGE OF HOBART’S OBJECTION TO BILL OF COSTS

Defendant, Village of Hobart, Wisconsin (“Village”), objects to the Plaintiff Oneida Nation’s (“Nation”), request for Bill of Costs (ECF No. 150) in the amount of \$43,038.48.¹ Of those requested costs, the Village objects to \$31,987.92, which relate extensively to expert expenses and research. For the reasons below, the Clerk should deny the Nation’s requested Bill of Costs and disallow an amount no less than \$31,987.92.

LEGAL STANDARD

Federal Rule of Civil Procedure 54(d)(1) permits the taxation of costs. “The ‘costs’ recoverable under Rule 54(d) are enumerated in 28 U.S.C. § 1920.” *Peck v. IMC Credit Servs.*, 960 F.3d 972, 975 (7th Cir. 2020). “To be compensable . . . a particular expense must fall into one of the categories of costs statutorily authorized for reimbursement” under 28 U.S.C. § 1920. *Cefalu v. Vill. of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000). 28 U.S.C. § 1920 allows the Clerk to tax the following items as costs:

¹ The Nation’s calculation of costs includes a mathematical error of \$45.00. The Nation’s Grand Total for “Itemization of Depositions and Other Taxable Costs” is \$38,071.89, but lists “other costs” in the amount of \$38,026.89. (*Compare* Dkt. 150 at 1 *with* Dkt. 150-1 at 51.)

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title; and
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The United States Supreme Court has “made clear that the ‘discretion granted by Rule 54(d) is not a power to evade’ the specific categories set forth by Congress” in § 1920, but rather “it is solely a power to decline to tax, as costs, the items enumerated in § 1920.” *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 572-73 (2012) (further reasoning “taxable costs are limited by statute and are modest in scope.”)

Civil L.R. 54 further provides that it is the Eastern District’s practice to tax the following items as costs:

- (1) Fees of the Court Reporter for All of or Any Part of the Transcript Necessarily Obtained for Use in the Case. The costs of the original transcript, if paid by the taxing party, and the cost of the taxing party's copy are taxable. The costs of a transcript of other court proceedings are taxable if the transcript was necessary for appeal, requested by the Court, or prepared pursuant to stipulation of the parties and necessarily obtained for use in the case. In the case of a daily transcript, the parties must follow Civil L. R. 54(b)(5).
- (2) Deposition Costs. The court reporter's charge for the original of a deposition, if paid by the taxing party, and the taxing party's copy are taxable if the deposition was reasonably necessary for use in the case, whether or not it was used at trial. Reasonable expenses of the reporter, the presiding notary or other official and postage costs for sending the original deposition to the Clerk of Court for filing are taxable. Counsel's fees and expenses in attending and

taking the deposition are not taxable. Per diem attendance fees for a witness at a deposition are taxable as per 28 U.S.C. § 1821. If a translator is needed to take the deposition, a reasonable translator fee is taxable.

- (3) **Witness Fees, Mileage, and Subsistence.** The rate for witness fees, mileage, and subsistence are fixed by statute. (See 28 U.S.C. § 1821 and Civil L. R. 54(b)(5).) Such fees are taxable whether or not the witness attends voluntarily or is under subpoena, provided the witness testified at the trial and received a witness fee. No party shall receive witness fees for testifying in his or her own behalf. Fees for expert witnesses are not taxable in a greater amount than that statutorily allowable in the case of ordinary witnesses, except in exceptional circumstances by order of the Court.
- (4) **Copying Costs.** Taxable costs include the cost of copying papers (including, but not limited to, maps, charts, photographs, summaries, computations, and statistical comparisons) that are reasonably necessary for use in the case (see 28 U.S.C. § 1920(4)).

Under the Local Rule the Clerk “will not tax the cost of demonstrative evidence created for use in the case, daily transcripts, witness fees for mileage for trial witnesses coming from outside of the District in excess of 100 miles from the place of trial, and expert witness fees in excess of the statutory allowance, unless the party requesting taxation obtained Court approval before the costs were incurred, and in the case of demonstrative evidence, before the evidence was used at trial.” E.D. Wis. Civil L.R. 54(5).

OBJECTION

I. THE CLERK SHOULD DENY THE NATION’S REQUEST FOR “OTHER COSTS” IN THE AMOUNT OF \$29,383.00 BECAUSE THEY ARE RESEARCH RELATED.

The Nation characterizes its request for “other costs” as relating to the “[r]etrieval, reproduction, and transmittal of historical documents required to respond to Village of Hobart discovery.” (Dkt. 150-1 at 51.) In support the Nation provided an invoice from Nicklason Research Associates, which provides:

Re: Invoice for historical research conducted from September through November 2017, at the National Archives in Washington, D.C., and College Park, Maryland, documenting the status of the Oneida Indian Reservation, Wisconsin, for the period between 1934 and 1975. All documents located and scanned during the search have been sent to Mr. James Bittorf via Drop Box.

I) Research Labor = \$29,338.00

Mark Leutbecker = \$12,658.00
(194.75 hours x \$65.00/hour)

Vicki Killian = \$12,480.00
(192.00 hours x \$65.00/hour)

Juan Morales = \$4,200.00
(105.00 hours x \$40.00/hour)

II) Expenses = \$45.50
(NARA document scans)

TOTAL AMOUNT DUE = \$29,383.00

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(Dkt. 150-1 at 69.) Of the request, a total of \$29,338.00 is for “research labor” billed at an hourly rate for “historical research” in locating and scanning documents at the National Archives in Washington, D.C. and College Park, Maryland. (*Id.*) The Nation’s request to tax this voluntary expense for research is not a recoverable cost.

A. The Nation’s election to pay for researching information and documents outside its possession, custody, and control is not a taxable statutory cost.

1. Historical research expenses are not taxable costs under 28 U.S.C. § 1920.

Expenses related to “historical research” and “research labor” are not items listed in § 1920, nor are they the type of expenses listed in Civil Local Rule 54. Consequently, the Clerk should disallow and deny the Nation’s request for this reason alone. *See Taniguchi*, 566 U.S. at 573 (“taxable costs are limited by statute and are modest in scope.”)

2. Outside historical research is outside the scope of discovery.

Even if “historical research” fell within one of the express categories under 28 U.S.C. § 1920 or Eastern District of Wisconsin Civil Local Rule 54 – which it does not – it is not a cost

that is recoverable. Contrary to the Nation's contention, the Nation was not required to conduct research at the National Archives in Washington, D.C. and College Park, Maryland, using an outside research consultant firm in order to respond to the Village's discovery.

Under Federal Rule of Civil Procedure 34, a party is only required to produce documents or information "in the responding party's possession, custody, or control." Fed. R. Civ. P. 34(a)(1). Moreover, the Court's Order regarding the Production of Documents and Electronic Data (Dkt. 55) clearly identified the parties to "identify, search, and review for production ESI in their possession, custody, or control." (*Id.* ¶ 13.) To the extent that "sources of potentially relevant information [were] deemed 'not reasonably accessible'" the parties were required to meet and confer. (*Id.* ¶ 15.) Finally, the Order explicitly provided that "[e]ach party shall bear its own costs of production." (*Id.* ¶ 18.)

Consequently, to extent the Nation chose to hire an outside research firm to perform "historical research" to substantiate its claims regarding the Reservation's status, it was at its own cost. The Nation was not required, as it may contend, to conduct this outside research in order to respond to discovery.²

B. The Nation's research costs are akin to attorney's fees or expert fees, and therefore, not recoverable.

Research costs are not a taxable cost. *See Haroco, Inc. v. Am. Nat. Bank & Tr. Co. of Chi.*, 38 F.3d 1429, 1440-41 (7th Cir. 1994). The Seventh Circuit has repeatedly held that "research costs 'are more akin to awards under attorney's fees provisions than under costs.'" *Id.* (reducing more than \$30,000 in costs) (citing *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir.1990)). This is because the cost of research "is normally matched with a

² Moreover, the Nation's contention is vague and unsupported. The Nation does not identify what specific discovery requests from the Village allegedly required the Nation to conduct outside historical research.

corresponding reduction in the amount of time an attorney must spend researching.” *Haroco, Inc.*, 38 F.3d at 1440.

Likewise, to the extent the Nation may argue the research is not akin to attorney’s fees, the fees are certainly akin to expert witness or investigation services. Similarly, those type of expenses are also not recoverable as an item of taxable cost. *See, e.g., W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 87 (1991) (“None of the categories of expenses listed in § 1920 can reasonably be read to include fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity.”); *Tinch v. City of Dayton*, 199 F. Supp. 2d 758, 770 (S.D. Ohio 2002) (“Courts have held that a prevailing party is not entitled to recover expenses incurred by an investigator, since those expenses are not set forth as recoverable costs under § 1920.”); *Frigiquip v. Parker-Hannifin Corp.*, 75 F.R.D. 605, 614 (W.D. Okla. 1976) (expert research expenses not allowed and are distinguished from costs for exhibit preparation).

Here, the Nation’s decision to pay an hourly rate for an outside research firm to conduct historical research is precisely the situation that is akin to attorney, expert, or investigator fees. Those fees are not listed in § 1920 or Civil Local Rule 54, and as such, the Nation’s request for these expenses should be denied.

II. THE CLERK SHOULD DENY THE NATION’S REQUEST FOR FEES FOR EXEMPLIFICATION AND COSTS OF MAKING COPIES IN THE AMOUNT OF \$2,604.92 BECAUSE THOSE COSTS ARE VAGUE AND EXPERT WITNESS RELATED.

The Nation’s request for costs in the amount of \$2,604.92 for fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case can be broken down as follows:

- \$1,772.00 related to “Scan Heavy Litigation” from Quantum LS LLC, (Dkt. 150-1 at 28);

- \$440.36 related to expert expenses from David Edmunds for his document preparation, (Dkt. 150-1 at 35);
- \$92.01 related to expert expenses from Frederick Hoxie for locating and copying documents cited in his expert report, including costs relating to mailing, (Dkt. 150-1 at 37-39); and
- \$300.55 related to Hoxie's costs for assembling and submitting published book references to accompany his expert report and producing photocopies of his expert report. (Dkt. 150-1 at 42-46.)

As described *supra*, these specific costs are not recoverable because they are not listed in § 1920, nor are they listed in Civil Local Rule 54.

A. The Nation's request for \$1,772.00 from Quantum LS LLC should be denied as vague and not necessarily obtained for use in the case.

The Nation cannot categorize a certain expense as within one of the listed categories in § 1920 without support. In its submission, the Nation does not identify what the \$1,772.00 described as "Scan Heavy Litigation" was obtained for or why that expense was necessary or reasonable. Where a court cannot "discern the purpose" of the expense, such as copying costs, the court cannot determine whether the copies were necessary for use in the case. *Am. Automotive Accessories, Inc. v. Fishman*, 991 F. Supp. 995, 997 (N.D. Ill. 1998). Moreover, to the extent this expense was incurred for the Nation's own use, such costs are not recoverable. *See Haroco*, 38 F.3d at 1441. However, because it is unknown what the Nation's expense for "Scan Heavy Litigation" was for, the cost should be disallowed.

B. The Nation's request for costs totaling an amount of \$832.92 should be denied as those costs relate to expert witness expenses and postage.

The Nation's own submission provides further evidence that its request for exemplification and the costs of making copies of any materials are expenses charged by experts for assembling documents and their reports as well as mailing and producing copies of the expert

reports. Such expenses are not recoverable as statutory costs. *Peck*, 960 F.3d at 975 (mailing expenses not recoverable); *Heiar v. Crawford Cty., Wis.*, 746 F.2d 1190, 1203 (7th Cir. 1984) (“expenses of litigation that are distinct from either statutory costs or the costs of the lawyers time reflected in his hourly billing rates—expenses for such things as postage, long-distance calls, xeroxing, travel, paralegals, and expert witnesses—are part of the reasonable attorney’s fee” – not taxable costs); *Andrews v. Chevy Chase Bank FSB*, 706 F. Supp. 2d 916, 925 (E.D. Wis. 2010) (“expert witness expenses may not be calculated as part of attorneys’ fees or general litigation costs except as allowed by specific provisions of fee-shifting statutes”).

CONCLUSION

The Nation’s request for certain items in its Bill of Costs are not recoverable under § 1920 or Civil Local Rule 54, and therefore, should be denied. The Nation is permitted to no more than \$11,050.56 of its requested costs. The Clerk should disallow \$31,987.92 and deny the Nation’s request.

Dated: November 2, 2020

Respectfully submitted,

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